

DEC 23 2005

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAMIEN RIVERO,

Plaintiff - Appellant,

v.

DEBRA BROOKS; E.K. MCDANIEL; DON
NIXON; CODY PRITCHETT; THOMAS
ALLEN,

Defendants - Appellees.

No. 04-15334

D.C. No. CV-01-00549-DWH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Argued and Submitted April 13, 2005
San Francisco, California

Before: BEEZER, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

Damien Rivero filed an action under 42 U.S.C. § 1983 against E.K.
McDaniel, warden of Nevada's Ely State Prison, and corrections officers Thomas

* This disposition is not appropriate for publication and may not be cited to
or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Allen, Debra Brooks, Don Nixon, and Cody Pritchett.¹ He claims that the defendants violated his Eighth Amendment rights by failing to intervene more quickly in a prison assault upon him and violated his First Amendment right of access to the courts by confiscating his legal papers. The district court interpreted 42 U.S.C. § 1997e(a) to require full exhaustion of all claims and therefore dismissed the entire suit without prejudice because Rivero had failed to exhaust his administrative remedies on the First Amendment claim.

For the first time on appeal, Rivero argues that his property confiscation grievance did not question or challenge general prison policy or procedure and had therefore been fully exhausted at the third administrative level. We decline to consider this argument because it was not raised before the district court and no exceptional circumstances militate in favor of our reaching the argument's merits. *See Marx v. Loral Corp.*, 87 F.3d 1049, 1055 (9th Cir. 1996). Therefore, we accept the district court's conclusion that Rivero's First Amendment claim was unexhausted.

In dismissing the entire action based on this unexhausted claim, the district court did not have the benefit of our recent decision in *Lira v. Herrera*, 427 F.3d

¹ Allen, Brooks, and McDaniel are the only defendants who remain at this stage of the proceedings. Rivero was unable to effect service against Pritchett, and Nixon failed to answer, prompting the entry of a default judgment against him.

1164 (9th Cir. 2005). Under *Lira*, when presented with a mixed complaint, a district court should only dismiss the unexhausted claims—not the entire suit—unless the mixed claims are intertwined. *Id.* at 1775. The district court properly dismissed Rivero’s unexhausted First Amendment claim because it was not intertwined with his Eighth Amendment claim; the Eighth Amendment claim remains pending. *Id.* We therefore affirm in part, reverse in part and remand for further proceedings consistent with *Lira*.

Each party shall bear its own costs of appeal.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.